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No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

STEVEN M. KRAMER,

Petitioner,

-against-

NEW JERSEY SUPREME COURT, ET AL,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE NEW JERSEY SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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Dated: October 3, 1997

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NO._____

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM 1997

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STEVEN M. KRAMER,

Petitioner,

v.

NEW JERSEY SUPREME COURT, ET. AL.

Respondents.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW JERSEY SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED:

1. Will the congressional policy of protecting creditors in bankruptcy proceedings be frustrated by allowing state attorney disciplinary boards to discipline attorneys who follow federal bankruptcy law that conflicts with state rules of professional responsibility?

2. Where an attorney has been disciplined for violation of a state rule that conflicts with federal bankruptcy law does the Supremacy Clause prohibit the discipline?

3. Where a state Supreme Court justice had secret ex parte communications with a family member of that justice concerning petitioner while the disciplinary proceedings were pending in which communications the family member urged the justice that petitioner had acted unethically, and where the petitioner and that family member were involved in a pending multi-million dollar dispute, did the New Jersey Supreme Court violate the attorney's due process rights?

4. Where a key member of the state disciplinary committee represented a tobacco company and a bank, all of whom were being sued by the attorney's clients, was the attorney deprived of due process when the member refused to recuse himself?

5. Where the attorney was disciplined for failing to immediately withdraw as counsel of record in a federal appeal because he was required under the rules of the U. S. Court of Appeals to first obtain substitution of counsel or consent of the court or face sanctions by the Court of Appeals, does the Supremacy Clause prohibit the discipline?

6. Where the petitioner, a New York based attorney, was suspended for six months for conduct not involving moral turpitude, did the New Jersey Supreme Court violate the Privileges and Immunities Clause and Equal Protection Clause by discriminating against petitioner, where New Jersey based attorneys found guilty of conduct involving moral turpitude, including drug dealing, homicide, wife beating, and fraud, were merely reprimanded?

PARTIES TO THE PROCEEDINGS

Steven M. Kramer

Supreme Court of New Jersey

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ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW JERSEY SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

Petitioner Steven M. Kramer respectfully prays that a writ of certiorari be issued to review the judgment of the New Jersey Supreme Court entered on April 24, 1997.

OPINIONS BELOW

The opinion of the New Jersey Disciplinary Review Board is found at A0023. The decision of the New Jersey Supreme Court is found at A0013.

JURISDICTION

The subject matter jurisdiction of this Court is invoked under 28 U.S. S. § 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

1. Supremacy Clause
2. Due Process Clause
3. Equal Protection Clause
4. Privileges and Immunities Clause

STATEMENT OF CASE & PROCEEDINGS BELOW

Beginning in 1986, petitioner represented one DeLuca and Koala Blue Co. (USA) in a suit in federal court in California. That suit resulted in an appeal in 1989 to the US Court of Appeals for the Ninth Circuit. In 1989 petitioner and DeLuca entered into a revised retainer agreement in anticipation of a filing by DeLuca of a Petition under ChXI of the Bankruptcy Code. Because Petitioner had reasons not to have complete confidence in the client, a provision was included in the agreement that required the client/debtor to involve petitioner, as bankruptcy counsel, in any settlement negotiations. A0030.

While that appeal was pending, the debtor discharged petitioner and entered into a settlement agreement that (i) included a secret side deal giving the debtor additional consideration, (ii) eliminated the creditors' interests, and (iii) provided for the bankruptcy action to be dismissed based upon a fraud on the bankruptcy court.

Petitioner then:

1. Advised the debtor that under the rules of the Ninth Circuit, petitioner could not withdraw as counsel for the corporate appellant until other counsel entered an appearance. Petitioner offered to prepare the substitution of counsel pleading.

2. Filed an objection to the settlement.

3. Filed suit against DeLuca for attorneys' fees based upon the revised fee agreement.

As a result of petitioner's lawsuit, disciplinary proceedings were instituted resulting in a recommendation by the New Jersey Disciplinary Review Board (DRB) that petitioner be suspended for six months for taking a proprietary interest in the lawsuit based upon the foregoing term in the revised retainer agreement and for interfering with the client's desire to settle the case by engaging in the first two acts set forth above.A0023. One of the DRB's key members and most active in the disciplinary review hearing was Michael Cole of the law firm Riker, Danzig, lead New Jersey counsel for R. J. Reynolds Tobacco Co.. Petitioner had many tobacco product liability suits against Reynolds. In addition, that

DRB member is also counsel to United Jersey Bank. Petitioner had been at the time prosecuting a lender liability suit against that bank resulting in a favorable appellate decision against it while the disciplinary proceedings were pending. That DRB member had also brought a RICO suit against petitioner's co-counsel in the bank litigation.

On April 24, 1997 the New Jersey Supreme Court adopted the recommendation and denied petitioner's motion to enlarge the record to include evidence of constitutional violations consisting of those conflicts consisting of those conflicts A0013. Petitioner was suspended for six months commencing May 16. Reciprocal rules have expanded that suspension to other states. A number of New Jersey Courts have dismissed cases when petitioner's clients were unable to find replacement counsel, including at least three tobacco cases all of which involved Coles.[1]

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[1]Under the New Jersey Supreme Court rules, it is unethical for petitioner to even suggest the names of possible replacement counsel for his former clients. The clients are left adrift.

STATEMENT OF FACTS

Petitioner has been suspended for six months because he authored the following four documents:

1. A fully disclosed retainer agreement consistent with federal bankruptcy law whereby petitioner agreed to represent a Ch XI debtor and a corporation in an appeal. A0030. Because petitioner had reason to fear that the debtor might enter into a secret side deal petitioner inserted a provision that required that, in the event that the debtor attempted any settlement negotiations on behalf of the bankruptcy estate, petitioner's involvement would be obtained. Events proved petitioner's fear to be well-founded. After terminating the petitioner, the debtor and his other counsel entered into a secret side deal that they did not disclose to the bankruptcy court. The New Jersey Disciplinary Review Board held that the revised retainer agreement violated New Jersey Model Rule of Professional Conduct, RPC1.8(a).

2. An objection to a settlement served on the trustee in bankruptcy and the debtor's other attorneys. A0040. The DRB held that petitioner had no right to file an objection.

3. A letter to the debtor's other attorneys explaining that petitioner could not withdraw the appeal on behalf of the corporation without substitution of counsel, or he would face sanctions by the Court of Appeals for attempting to leave the corporation unrepresented.

4. A pleading in the Ninth Circuit accurately advising that court that the corporate appellant was not in bankruptcy. This proceeding does *not* involve - and the respondents have never suggested to the contrary:

1. Any misrepresentation to any tribunal
2. Any non-disclosure
3. Any dishonesty
4. Any charge of moral turpitude

The New Jersey Supreme Court affirmed the suspension without opinion, hearing or oral argument A0013. That Court denied Petitioner's motion to enlarge the record to include evidence of constitutional violations.

REASONS WHY PETITION SHOULD BE GRANTED

INTRODUCTION

1. The N. J. DRB and the New Jersey Supreme Court deprived petitioner of the privileges and immunities guaranteed to him by the 14th Amendment to the U.S. Constitution. They also deprived the petitioner of equal protection and due process under the law.

2. Petitioner never had a realistic opportunity to fully and fairly litigate the constitutional claim in the New Jersey proceeding.

3. The New Jersey Supreme Court's suspension was based on the finding that petitioner had violated the state ethical rule prohibiting an attorney from taking an interest in a lawsuit by requiring participation of bankruptcy counsel in any settlement negotiations in a bankruptcy matter. That rule is in conflict with federal bankruptcy law requiring counsel to exercise a fiduciary duty to the bankruptcy estate and therefore violates the Supremacy Clause. The New Jersey courts have made it clear that it will

discipline any bankruptcy counsel who attempts to honor her fiduciary duty to the bankruptcy estate's creditors by requiring the debtor not to negotiate a settlement without bankruptcy counsel's participation.

4. Allowing the enforcement of such rules in the bankruptcy context frustrates congressional goal of protecting creditors in bankruptcy proceedings.

5. The N. J. DRB and Supreme Court imposed a six month suspension on the petitioner for conduct-entering into a fee agreement in the context of a bankruptcy that required the debtor to involve the petitioner in any settlement negotiations - that is completely proper under federal bankruptcy law. Commodity Futures Trading Commission v. Weintraub, 471 U.S. 343, 105 S.Ct. 1986 (1985). Accordingly, the N. J. Disciplinary Review Board and New Jersey Supreme Court's ruling violates the Supremacy Clause.

6. The suspension violates due process because it was based on a rule that does not even directly speak to the circumstances that gave rise to the suspension.

7. Petitioner was also suspended for refusing to withdraw from representing the client (which included a corporation) on the grounds that the rules of the Ninth Circuit prohibited him from withdrawing until new counsel substituted in for him. The Supremacy Clause requires the states to honor the Ninth Circuit's rules.

8. The N.J. DRB and New Jersey Supreme Court refused to hear petitioner's constitutional claims mandating reversal. Selling v. Radford, 243 US 46 (1917).

9. This Court has made it clear that the 'opportunity to practice law should be considered a fundamental right.' Supreme Court of New Hampshire v. Piper, 470 U.S. 274, 281 (1985).

10. The foregoing would permit a reasonable finder of fact to conclude that the petitioner was a victim of bad faith, Middlesex County Ethics Comm. v Garden State Bar Association,

457 US 423 437 (1982) by a biased tribunal. Gibson v. Berryhill, 411 U.S. 563, 579 (1973)., Selling, supra.

11. Petitioner never had a chance in the state proceedings at any stage to have an objective body evaluate the charges. Gibson v. Berryhill, 411 U.S. 563, 579 (1973), Selling, supra.

A. STATE ETHICAL RULES THAT DISCIPLINE BANKRUPTCY COUNSEL FOR REQUIRING A DEBTOR TO OBTAIN COUNSEL'S PARTICIPATION IN SETTLEMENT NEGOTIATIONS VIOLATE THE SUPREMACY CLAUSE

The N.J. DRB and New Jersey Supreme Court imposed a six month suspension on the petitioner for conduct-entering into a fee agreement in the context of a bankruptcy that required the debtor to involve the petitioner in any settlement negotiations - that is completely proper under the federal bankruptcy rules. A0041. Bankruptcy counsel has a duty to prevent the debtor from entering into side deals, exactly what the debtor did here. "Any counsel

retained by the trustee or debtor in possession is a fiduciary. He owes the duty of undivided loyalty and exclusive allegiance to the estate in bankruptcy." In re Prudent Holding Corp., 152 B.R. 925, 939 (Bkrtcy NDGA 1992). That duty imposes a fiduciary duty to the creditors. Commodity Futures Trading Commission v. Weintraub, 471 U.S. 343, 105 S.Ct. 1986 (1985). Accordingly, the N.J. DRB and New Jersey Supreme Court's ruling clause is in conflict with federal law and violates the Supremacy Clause. As this Court admonished in Commodity Futures Trading Commission v. Weintraub, 471 U.S. 343, 355, 105 S.Ct. 1986, 1994 (1985):

"[debtor and his counsel] ignore that if a debtor remains in possession that is, if the trustee is not appointed the debtor's directors and officers bear essentially the same fiduciary obligation to creditors and shareholders as would the trustee for a debtor out of possession Indeed, the willingness of courts to leave debtors in possession is premised upon an assurance that the officers and managing employees can be depended upon to carry out the fiduciary responsibilities of a trustee. Id., at 651, 83 S.Ct., at 980."

Here, as counsel for an estate asset, petitioner faced the dilemma of either doing nothing regarding the appeal scheduled for December 5, 1989 argument and risk being sued by creditors as well as being sanctioned by the Ninth Circuit, or prosecuting the appeal to preserve a possibly valuable estate asset.

B. STATE ETHICAL RULES THAT DISCIPLINE AN ATTORNEY FOR FILING AN OBJECTION TO A FRAUDULENT BANKRUPTCY SETTLEMENT VIOLATE THE SUPREMACY CLAUSE AND THE FIRST AMENDMENT

C. PETITIONER'S DUE PROCESS RIGHTS WERE VIOLATED BY: (i) SECRET EX PARTE COMMUNICATIONS BETWEEN PETITIONER'S ADVERSARIES AND A SUPREME COURT JUSTICE WHO WAS RELATED TO THOSE ADVERSARIES (ii) THE REFUSAL OF COUNSEL FOR R. J. REYNOLDS TOBACCO TO RECUSE HIMSELF FROM THE DRB DELIBERATIONS, AND (iii) THE USE OF A STATE JUDGE AS PROSECUTOR (PRESENTER)

1. The conduct of the N.J. Supreme Court was fatally tainted by the following: On a number of occasions State Supreme

Court Justice Gary Stein had shockingly improper secret ex parte communications with his son, a New Jersey attorney, about the petitioner in the middle of the disciplinary proceedings against the petitioner. During those conversations, according to the testimony of Michael Stein before the Honorable Joseph Irenas, U. S. District Judge for the District of N.J., on January 3 of this year, Michael Stein complained to his father (Justice Stein) about the petitioner and told his father that he, Michael Stein, viewed petitioner's conduct in a matter involving Michael Stein to be unethical, and sought his father's assistance against Kramer.[2] The complaint by Stein was made not only on his behalf but also on behalf of Justice Stein's son-in-law, Ira Karasick, another N.J. attorney who was also an adversary of the petitioner's in that matter. That matter resulted in Stein (Michael) and Karasick receiving over $500,000.00 (five

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[2] That matter involved a fee dispute between petitioner and Lawrence Tribe. Tribe was represented by Stein and Karasick. see A0080 for background of this dispute. The proceeding before Judge Irenas arose from a complaint made by Stein, Karasick and Tribe in 1994.

hundred thousand) in fees from their client, Lawrence Tribe. None of this was disclosed to the petitioner until the petitioner unexpectedly obtained the admission during examination of Michael Stein in the hearing before Judge Irenas. Under this Court's decision in Gibson v. Berryhill, 411 U.S. 563, 579 (1973) petitioner was deprived of due process.

2. The N.J. DRB and the New Jersey Supreme Court permitted the most active decision maker on the DRB, Michael Cole, to urge that petitioner be suspended even though, at the time, Cole had multiple conflicts of interest. The DRB cavalierly rejected petitioner's objection. The Supreme Court denied petitioner's motion to enlarge the record to include that evidence. As this Court has instructed:

> "It is sufficiently clear from our cases that those with substantial pecuniary interest in legal proceedings should not adjudicate these disputes." Gibson v. Berryhill, 411 U.S. 563, 579 (1973).

3. The N.J. DRB and Supreme Court permitted the 'presenter' [prosecutor] of the charges to be an attorney who was also a part-time judge in the vicinage in which the local ethics committee's panel members practice. It was in the interests of the panel members to curry favor with that judge by ruling in his favor and against the petitioner. The N.J. DRB ignored the petitioners' objection.

D. THE PRIVILEGES AND IMMUNITIES CLAUSE AND EQUAL PROTECTION CLAUSE ARE VIOLATED WHEN A STATE DISCIPLINARY BOARD AND COURT DISCRIMINATE AGAINST AN OUT OF STATE ATTORNEY

1. The N.J. DRB and Supreme Court were motivated in part because of the petitioner's N. Y. residence as demonstrated by the following:

a. The N.J. DRB and New Jersey Supreme Court imposed a drastically more severe penalty on the petitioner, a N. Y. resident, than it has done for N.J. based lawyers who engaged in much more severe transgressions. Petitioner's conduct did not involve moral turpitude. Yet New Jersey attorneys whose

violations did involve moral turpitude received just a slap on the wrist.

b. For example, the N.J. DRB and New Jersey Supreme Court have routinely imposed only reprimands on N. J. based attorneys for such conduct as wife-beating In the Matter of Magid, 655 A2d 916 (1995) (misappropriation of funds In the Matter of Hofing, 655 A2d 914 (1995))., In the Matter of William Perkins, 143 NJ 139 (1996) (reprimand for fraudulent conduct and refusing to cooperate with ethics committee); In the Matter of Anthony F. Carracino 669 A2d 816 (1996) (reprimand for fraudulent conduct and dishonesty); In the Matter of Gregory M. Imperiale (reprimand for misappropriation of funds); In the Matter of Hamlet E. Goore, Jr. (reprimand for fraudulent statements); In the Matter of William C. Gasper, Jr. (reprimand for fraud and dishonesty); In the Matter of Hamlet, 140 NJ 72 (1995) (reprimand for fraud); In the Matter of Howard, 673 A2d 800 (1996) (3 month suspension for homicide). In In the Matter of James Picciano, 675 A2d 645 (1996) the DRB merely asked for an apology in exchange

for which the attorney was reprimanded. There the attorney engaged in multiple offenses involving repeated acts of malpractice. In In the Matter of Stephen Pepe, 666 A2d 163 (1995) an attorney engaged in drug dealing and was merely reprimanded.

2. No N.J. based attorney has ever been sanctioned, let alone suspended, for inserting such a provision in a fee agreement in similar circumstances.

CONCLUSION

Because of the interests of bankruptcy creditors and attorneys throughout the nation, the discrimination against non-New Jersey attorneys, and the unsavory bias that permiated the entire proceedings, this Court should grant the petition.

Respectfully submitted,

_____

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Dated: October 3, 1997

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SUPREME COURT OF NEW JERSEY
D-96 September 1996

IN THE MATTER OF	:	
		FILE
STEVEN M. KRAMER	:ORDER	APR 24 1997
		Stephen W.T.
AN ATTORNEY AT LAW	:	Clerk

The Disciplinary Review Board on November 8, 1996, having filed with the Court its decision concluding that STEVEN M. KRAMER of WAYNE, who was admitted to the bar of the State in 1983, should be suspended from the practice of law for a period of six months for his violations of RPC 1.2(a) (failure to abide by a client's decisions about the objective of the representation) and RPC 1.8(j) (obtaining a proprietary interest in the cause of action or subject matter of litigation), and good cause appearing,

It is ORDERED that STEVEN M. KRAMER is hereby suspended from the practice of law for a period of six months, effective May 16, 1997, and until the further Order of the Court; and it is further

ORDERED that the entire period of this matter be made a permanent part of respondent's file as an attorney at law of this State; and it is further

ORDERED that respondent be restrained and enjoined from practicing law during the period of his suspension and that he comply with Rule 1:20-20, and it is further

ORDERED that respondent reimburse the Disciplinary Oversight Committee for appropriate administrative costs incurred in the prosecution of this matter.

WITNESS, the Honorable Deborah T. Poritz, Chief Justice, at Trenton, this 23rd day of April, 1997.

I hereby certify that the foregoing
is a true copy of the original on file Clerk of the Supreme Court
in my office.
CLERK OF THE SUPREME COURT OF NEW JERSEY

INVESTIGATIVE REPORT
RE: DISTRICT IIIB ETHICS COMMITTEE
V. STEVEN M. KRAMER, ESQ.

Docket No. IIIB-90-11E

Procedural History

By letter dated August 31, 1990, the Honorable John C. Lifland, United States District Judge for the District of New Jersey forwarded to David E. Johnson, Jr., Director of the Office of Attorney Ethics, his Memorandum and Order in the matter of Steven Kramer v. Jon Deluca, Civil Action No. 90-0232 (JCL), filed in the United States District Court for the District of New Jersey. The Court indicated that it referred to "conduct which I felt was ethically questionable." By letter dated September 18, 1990, the matter was referred to the Secretary of the District IIIB Ethics Committee, with a copy to myself as Vice Chair of that Committee. By letter dated October 10, 1990, the matter was formally assigned to me by the Secretary for preliminary investigation and the preparation of an investigative report. By letter dated September 27, 1990, I wrote to respondent Steven M. Kramer, Esquire, and requested him to prepare and forward to me his written response to the allegations made. Mr. Kramer responded to that letter by letter dated October 29, 1990. On January 24, 1991, I met with Mr. Kramer's former client, Jon Deluca, in my office, and extensively interviewed him concerning the allegations. Subsequently, I interviewed by telephone Mr. Deluca's counsel in

the matter pending before Judge Lifland, George J. Singley, Esquire. After obtaining a signed authorization from Mr. Deluca, I obtained from Mr. Singley Mr. Deluca's litigation records which had been entrusted to him, amassing several linear feet. As a result of my meeting with Mr. Deluca, I was of the belies that two other attorneys who had, at varying times, represented Mr. Deluca, would have some knowledge of relevant facts, those being Jeffrey E. Jenkins, Esquire, of the firm of Jenkins & Jenkins, 208 White Horse Pike, Haddon Heights, New Jersey, and Thomas C. Zielinski, of the firm of Cozen & O'Connor, 1900 Market Street, Philadelphia, Pennsylvania. By letter dated February 7, 1991, I wrote to both of them requesting information regarding the background of this matter. Mr. Zielinski responded by letter dated February 11, 1991, and Mr. Jenkins responded by letter date May 22, 1991.

STATEMENT OF FACTS

In August of 1986, Jon E. Deluca, than a resident of Pennington, New Jersey, retained the services of Steven M. Kramer, Esquire to institute certain litigation against popular singer Olivia Newton-John, her partner, Patricia Farrar, and their company, known as Koala Blue, Inc. Mr. Deluca and his partner, a New York attorney named Edward J. Pastucha, Esquire, were, respectively, the Chairman of the Board and President of Koala Blue (USA) LTD., a company which had been formed essentially to enter into franchising arrangements with Olivia Newton-John, Patricia Farrar, and Koala Blue, Inc. for the marketing and distribution of Australian-oriented products in the United States, beginning in California, and in Europe. Deluca, Pastucha and Koala Blue (USA) LTD. opened in initial store, pursuant to the franchise agreement between the parties, in the Los Angeles area, but problems arose over management and money, and ultimately, Koala Blue, Inc., Farrar, and Newton-John terminated the franchise agreement.

Steven M. Kramer, Esquire, had represented Mr. Deluca in other business and commercial matters, and was now engaged by Deluca in reference to that termination and related claims. By letter agreement dated August 12, 1986 (Exhibit 1), Mr. Deluca and Mr. Kramer set forth the basis of a retainer agreement between them providing for a 40% contingent fee, whether by settlement or judgment, on all sums recovered, with costs to be paid on a monthly basis by Mr. Deluca as well as an $8,500 retainer.

Mr. Kramer proceeded to file suit on behalf of Mr. Deluca and Koala Blue Ltd. against Olivia Newton-John, Farrar and Koala Blue, Inc. in the United States District Court for the Central District of California, alleging violations of the California Franchise Investment Act (Exhibit 2). In that litigation, the District Court granted summary judgment in favor of the defendants. This apparently led Mr. Deluca to write to Mr. Kramer, by letter dated March 13, 1988, (Exhibit 3), indicating that he felt it was in his best interest to retain new counsel and asking that his files relating to the lawsuits be turned over to attorney Thomas C. Zielinski, Cozen & O'Connor, in Philadelphia, Pennsylvania. At or about that time, Olivia Newton-John's attorneys, relying on provisions of the franchise agreement between themselves and Deluca, filed a motion in the Central District of California for counsel fees arising out of the litigation. By Order dated April 22, 1988 (Exhibit 4), the Honorable Irving Hill, Judge of the United States District Court for the Central District of California, awarded counsel fees in favor of Olivia Newton-John, Pat Farrar, and Koala Blue, Inc., and against Deluca in the amount of $110,842. Thereafter, those parties had the judgment docketed in the United States District Court for the District of New Jersey, and retained the firm of Schenck, Price, Smith & King, Attorneys at Law, to

pursue Mr. Deluca's personal assets for satisfaction of that judgment. W. James MacNaughton, Esquire, was charged with the handling of that litigation on behalf of the firm. It would appear that, on behalf of his clients Mr. MacNaughton fairly aggressively pursued Mr. Deluca for a determination of funds available to answer the judgment which had been obtained in California against him. In the meanwhile, Mr. Kramer had filed a Notice of Appeal to the Ninth Circuit Court of Appeals in California from the summary judgment which had been entered in favor the defendants and against plaintiffs. During this time, certain settlement negotiations were going on among and between the parties as well. There had been no substitution of attorney, pursuant to Mr. Deluca's March 13, 1988 request, in the California litigation, but Mr. Zielinski was actively involved, and communicated with Mr. Kramer in attempting a resolution of the ongoing litigation. In that regard, Mr. Zielinski wrote to Mr. Kramer by letter dated April 26, 1989 making certain settlement proposals, which apparently had been discussed with Mr. MacNaughton. The gist of these were that the $110,000 judgment against Deluca would be marked satisfied, and Koala Blue, Inc. would pay Deluca the sum of $50,000 (Exhibit 5). The letter conveyed a request from Mr. Deluca to Mr. Kramer asking that Mr. Kramer communicate the settlement demands to Mr. MacNaughton. There was, in fact, no resolution of the litigation. As Mr. Deluca recounts it, although he was under severe pressure in a personal sense from the attempts here to recover the counsel fee judgment in California, and had seen his lawsuit in California go from one where there was hope of a substantial economic recovery, to a summary judgment against him, he was essentially persuaded by Mr. Kramer at this time to continue with the litigation and pursue the course of appeals through the Ninth

Circuit. Mr. Kramer filed a Notice of Appeal, as well, concerning the Order granting defendants' motion for counsel fees (Exhibit 6).

By letter dated May 1, 1989 (Exhibit 7), Mr. Deluca wrote to Mr. Kramer confirming a telephone conversation which they had on April 27, 1989. Essentially, in that conversation, Mr. Kramer agreed to assume payment of outstanding costs and expenses in reference to the California litigation, and to shoulder the economic burdens of the ongoing attempts to enforce the counsel fee judgment in New Jersey, by representing and defending Deluca in that regard and also by paying the costs and expenses, including attorney fees, for Mr. Deluca to file a petition for Bankruptcy under Chapter Eleven. The letter further recites that these agreements are made in reliance upon Mr. Kramer's representation that he (Deluca) should continue to prosecute the claims in California in lieu of seeking to negotiate a settlement at that time.

In mid May of 1989, Mr. Deluca changed his mind, and decided, under all the circumstances, that he wanted to pursue, actively, settling all the claims with Koala Blue, Inc. By letter dated May 11,

1989 (Exhibit 8), he wrote to Mr. Kramer expressing a general measure of dissatisfaction with the litigation, and advising Mr. Kramer that he had "decided to settle". By letter dated May 12, 1989 (Exhibit 9), Mr. Zielinski wrote to Mr. Kramer advising of a settlement offer from Koala Blue, Inc. in which the counsel fee judgment would be marked satisfied, and Mr. Deluca would receive a cash payment of $20,000. By letter dated May 15, 1989 (Exhibit 10), Mr. Deluca personally wrote to Mr. Kramer, indicating that he had not received a reply from Mr. Kramer to the various communications regarding settlement and advising that he (Mr. Deluca) had decided and determined to accept the settlement offer.

Jeffrey E. Jenkins, Esquire, of the firm Jenkins & Jenkins, Attorneys at Law, of Haddon Heights, New Jersey, was engaged as bankruptcy counsel for Mr. Deluca. There was a four way telephone conversation involving Mr. Jenkins, Mr. Kramer, Mr. Deluca and Mr. Zielinski in which Mr. Kramer told Mr. Deluca that he (Kramer) would pay all of the fees and costs necessary for Mr. Deluca's bankruptcy, and that in consideration for that agreement, Mr. Kramer wanted Mr. Deluca's agreement that the case against Koala Blue, Inc. could not be settled without Mr. Kramer's approval (Exhibit 11). Mr. Deluca, under these circumstances, gave that approval. Mr. Kramer forwarded his check to Mr. Jenkins to pay for a Chapter Eleven Bankruptcy filing on behalf of Mr. Deluca. Mr. Kramer wrote to Mr. Deluca by letter dated May 18, 1989 (Exhibit 12), modifying their original retainer agreement, in two regards. First, Mr. Kramer agreed to be responsible for expenses to pursue the litigation. Secondly, the agreement was modified by a stipulation that "...no settlement negotiations of less than $100,000,000 will take place without my [Mr. Kramer's] concurrence.

Therefore, despite the new understanding, matters continue to deteriorate. By letter dated July 27, 1989, Mr. Deluca wrote to Mr. Kramer advising that there was some danger of the Chapter Eleven proceedings being dismissed and his personal assets being subject to seizure, and again instructing Mr. Kramer to contact Koala Blue, Inc.'s attorney, Mr. MacNaughton, to discuss settlement of the claims (Exhibit 13). Apparently, Mr. Kramer did not, and by letter dated September 20, 1989, Mr. Deluca wrote to Mr. Kramer, releasing him in any and all capacities as his counsel and asking that he take no further action on his behalf in the case (Exhibit 14). By letter dated October 14, 1989 (Exhibit 15), Mr. Kramer wrote to Mr. Deluca, acknowledging that letter, and indicating that he had repeatedly attempted to contact Mr. Deluca to discuss this without success. He further indicated that he had spent substantial sums of money preparing the Ninth Circuit appeals and that he was proceeding to complete the task. Mr. Kramer also filed opposition in California (Exhibit 16), to a stay of the appeal in light of Mr. Deluca's Chapter Eleven bankruptcy filing. The basis of that opposition was that the corporate entity, Koala Blue USA Ltd. had not filed for bankruptcy and that the appeal should still proceed to

decision as to that appellant. By letter dated November 8, 1989, (Exhibit 17), Mr. Jenkins wrote to Mr. Kramer on Mr. Deluca's behalf objecting to Mr. Kramer's filings of pleadings on behalf of Mr. Deluca and the corporation. He further suggested that Mr. Kramer "stop this unauthorized and unethical representation and interference with Mr. Deluca's affairs immediately."

Mr. Kramer replied to Mr. Jenkins by letter dated November 8, 1989 (Exhibit 18), which essentially indicated that he intended to pursue the appeal, objections notwithstanding, and emphasized at that time that he was protecting corporate rights. This letter generated a response from Mr. Pastucha of November 8, 1989 (Exhibit 19), to Mr. Jenkins, a copy to Mr. Kramer, indicating that he had never authorized Mr. Kramer to represent the corporation, and joining in Mr. Jenkins' demand that Mr. Kramer cease his unauthorized representation of that entity. Mr. Kramer faxed a brief note to Mr. Jenkins on November 8 advising that Deluca's letter of termination was ineffectual under the name of new counsel and offered to prepare a stipulation. His letter also asserted an attorneys' lien on any sums paid to Deluca from any "purported settlement" (Exhibit 20). By letter dated November 12, 1989, Mr. Kramer replied to Mr. Pastucha's letter indicating that absent a substitution of attorney, he would continue as counsel for Koala Blue USA Ltd. and intended to appear at oral argument on the appeal scheduled for December 5 (Exhibit 21). The following day, Mr. Kramer wrote to Mr. Deluca, accusing him of refusing "to honor the terms of our retainer agreement." The letter (Exhibit 22) further indicated that unless he heard from Mr. Deluca by November 16, he (Kramer) would proceed to institute suit against Deluca. He also expressed confidence in an ultimately

successful appeal as to the California litigation, and an intention to sue Mr. Jenkins' law firm for "interference with my contract with you." By letter dated November 16, 1989, Mr. Jenkins and Mr. Deluca were provided with copies of correspondence which expressed Mr. Kramer's objection to any settlement of the California litigation and a desire to appear personally before the Bankruptcy Court on that issue (Exhibit 23). By letter dated November 16, 1989 (Exhibit 24), Mr. Kramer forwarded to both Mr. Deluca and Mr. Jenkins copies of a Complaint that he indicated would be "filed on Monday." The Complaint, which named Mr. Deluca, Mr. Jenkins, and his law firm as defendants, alleged that Deluca had violated the terms of their retainer agreement, in particular insofar as Deluca had agreed that he would proceed with the Ninth Circuit Appeals if Mr. Kramer financed the bankruptcy proceedings. Counts against Mr. Jenkins and his firm allege that they had advised Deluca to terminate his relationship with Mr. Kramer and to dismiss the Ninth Circuit actions out of spite and ill will.

Mr. Deluca filed a pro se substitution of attorney in the Ninth Circuit, dated November 20, 1989 (Exhibit 25), and a certification by himself indicating that he wished the automatic stay to continue in effect, notwithstanding pleadings that had been filed by Mr. Kramer (Exhibit 26).

Ultimately, a settlement was reached between Olivia Newton-John, Patricia Farrar, Koala Blue, Inc., and Mr. Deluca and Koala Blue USA Ltd., which was set forth in a lengthy settlement agreement dated November 21, 1989 (Exhibit 27). Under the terms of that agreement, the measure of compensation from the previous offer to Mr. Deluca had been reduced to $10,000.

Thereafter, as of Docket No. 90-0232, Mr. Kramer filed a pro se Complaint against Mr. Deluca in the United States District Court for the District of New Jersey (Exhibit 28), alleging, among other things, that Deluca had breached the agreement between them to prosecute the California actions through the two pending appeals in the Ninth Circuit, and sought damages "in excess of $300,000." The Complaint also contained a quantum meruit count for legal services rendered. Prior to bringing that lawsuit, Mr. Kramer failed to give Mr. Deluca notice of his right to utilize the Fee Arbitration process, contrary to Rule 1:20A-6.

In Mr. Kramer's action against Mr. Deluca, Mr. Deluca was represented by George J. Singley, Esquire. By Memorandum and Order entered and filed on August 31, 1990 (Exhibit 29), the Honorable John C. Lifland, Judge of the United

States District Court for the District of New Jersey, granted summary judgment in favor of Mr. Deluca and against Mr. Kramer. In the course of that memorandum, Judge Lifland noted probable ethics violations by Mr. Kramer for RPC 1.2(a), and RPC 1.8(j).

Mr. Kramer's response to the indications of unethical conduct contained in the District Court's Memorandum and Order was essentially that, based upon his prior experience as special counsel to debtors in bankruptcy, he had no fiduciary duty to Mr. Deluca, but rather his obligations ran to the "estate", presumably referring to Mr. Deluca's creditors (Exhibit 30).

ANALYSIS

Rules of Professional Conduct Involved

Rules of Professional Conduct implicated in this matter would include RPC 1.2 Scope of Representation, and RPC 1.8 Conflict of Interest: Prohibited Transactions.

Discussion of Application of Rules of Professional Conduct

RPC 1.2(a) provides, in pertinent part, that a lawyer "shall abide by a client's decision concerning the objections of representation," and "...shall abide by a client's decision whether to accept an offer of settlement of a matter." It is clear beyond rational question that Mr. Kramer's conduct in this instance violated this rule. While Mr. Deluca, on occasion, experienced some diffidence about pursuing, or not pursuing, the California litigation through the appellate process, at least as of Mr. Deluca's letter of July 27, 1989, Mr. Kramer was on notice of a fairly unalterable and steadfast desire on Mr. Deluca's part to resolve the claims with Newton-John, Farrar and Koala Blue, Inc. with finality. It is clear, and not seriously disputed by Mr. Kramer, that he was not abiding by Mr. Deluca's desires or decisions concerning the outcome of the litigation, at that point in time, nor was he abiding by Deluca's

clearly-communicated decision to accept the settlement offers from the defendants. The amendment to the original retainer agreement, commemorated in the letter of May 18, 1989 (Exhibit 12), which gave Mr. Kramer veto authority over settlement negotiations of less than $100,000,000 is itself, as Judge Lifland observed, a violation of RPC 1.2(a), in that it attempts to deprive the client of his irrevocable authority over both the objectives and outcome of the litigation. It is no defense to a charge of unethical conduct in this regard under RPC 1.2(a) that the conduct occurred with the client's consent.

Likewise, neither the Federal Bankruptcy Code nor the Bankruptcy Rules support Mr. Kramer's essential position that he had acquired new clients in this matter, other than Mr. Deluca, by virtue of the Chapter Eleven filing. There is no indication even that Mr. Kramer was ever appointed by the Trustee, with Court approval, as special counsel in this matter, pursuant to 11 U.S.C.S. 327(a). Had he been, however, the answer would be the same. The process and procedure under bankruptcy law does not suggest in any way that a special counsel's relationship with his client is altered so as to relieve the attorney of the ethical obligations imposed by the Rules of Professional Conduct. Bankruptcy

law does contain a mechanism for protecting creditors from the adverse results of a low compromise settlement of a debtor's claim, but it does not involve any exercise of independent judgment by counsel for the debtor. Bankruptcy Rule 9019(a) Compromise, provides that if such an affirmative claim is being considered for settlement, the subject is brought, on motion by the trustee, with notice of the creditors, before the Bankruptcy Court. At that hearing, the Court may, or may not, depending upon the evidence and the objections presented, approve the proposed compromise or settlement. See generally, Cowans Bankruptcy Law & Practice Section 3.23 pp. 355-361 (1989 Ed.). It is thus, the Court after consideration of the objections of the creditors, which determines and protects the interest of what Mr. Kramer refers to as the estate.

After Mr. Deluca had made it clear beyond question in the early fall of 1989 that he wished the litigation terminated and that he wanted to accept the settlement offers as made by the defendants, the litigation, and in particular, the appeals, continue forward over his expressed desires and objections. That the appeals may have succeeded, or that the underlying litigation had considerable substantive merit are of no moment in this analysis. The litigation moved onward, like some uncontrolled juggernaut, and developed a life of its own,

unrestrained by its principal. Clearly, this was in violation of RPC 1.2(a).

I likewise conclude that Mr. Kramer's conduct constitutes as well a violation of RPC 1.8(j) in that by the agreement of May 18, 1989, Mr. Kramer acquired a proprietary interest in the cause of action and litigation which he was conducting on behalf of Mr. Deluca. By transferring, or attempting to transfer, authority of settlement negotiations of less than $100,000,000 to himself, rather than to his client, Mr. Kramer, and the agreement, attempted to endow himself with what was essentially a property right in the subject matter of the litigation. While I entertain no doubt that Mr. Kramer sincerely felt that the appeal would be successful in the Ninth Circuit Court of Appeals, and that the prospect for a large financial recovery was in the wind, the self-evident substance of the communications among the parties beginning in the fall of 1989 and thereafter reveals that Mr. Kramer was acting, at least in part, to protect what he discerned as his own financial stake in the claim. The proposed complaint by which Mr. Kramer threatened to sue Mr. Deluca and Mr. Jenkins, and the actual complaint by which he did sue Mr. Deluca, admit as much, particularly insofar as they alleged and sought recovery of damages to Mr. Kramer beyond the allegations of quantum merit compensation. It is difficult to fault

Mr. Jenkins' observation (Exhibit 31) that in this conduct, Mr. Kramer was seeking, in large measure, to vindicate his own economic interests in the litigation. While our Rules of Court and Rules of

Professional Conduct sanction, in such contingent fee arrangements, the joint pursuit of economic interests which are beneficial to both attorney and client, it is always understood that it is the client's desires and wishes which control the objectives of the litigation and any settlement thereof. An attorney may attempt, by way of persuasion, to influence a client's decision in these regards, but the decision is, and always will be, ultimately that of the client. Any attempt, such as occurred here, to alter the basic structure of that relationship by transferring control of the litigation to the attorney, to the detriment of the client, gives the attorney a proprietary claim in the litigation not envisioned by those rules, and results in the kind of conflict that in fact here occurred, contrary to RPC 1.8(j).

Conclusions

Based upon my review of the record in this matter, my interview with Mr. Deluca, and the investigation as conducted above, I conclude that there is evidence of unethical conduct on the part of Steven M. Kramer, Esquire in two regards: (1) a violation of RPC 1.2(a) by a failure to abide by Mr. Deluca's decisions concerning the objectives of the representation, and a failure to abide by Mr. Deluca's decision as to whether to accept an offer of settlement, evidenced by the letter agreement dated May 18, 1989, and (2) a violation for RPC 1.8(j), in

that by virtue of that agreement, and conduct occurring thereafter, Mr. Kramer acquired a proprietary interest in the involved cause of action and subject matter of the litigation which was being conducted on behalf of Mr. Deluca. For these reasons, I recommend the issuance of a Formal Complaint, as attached hereto.

Respectfully submitted,

ALAN P. BRUCE
Investigator

June 18, 1991

SUPREME COURT OF NEW JERSEY

DISCIPLINARY REVIEW BOARD
DOCKET NUMBER: 38-90-11E

IN THE MATTER OF :

DISTRICT III-B ETHICS :
HEARING REPORT RECOMMENDING
COMMITTEE
REPRIMAND/SUSPENSION/
:
DISBARMENT
v.
:
Steven M. Kramer

TO THE HONORABLE CHAIR AND THE MEMBERS OF THE DISCIPLINARY REVIEW BOARD

The District III B Ethics Committee Hearing Panel respectfully shows:

Respondent was admitted as a member of the bar of New Jersey in

1983, and was engaged in the practice of law at Suite 3, 420 Commerce Lane, in the City of Berlin, Camden Country, New Jersey.

On June 24, 1991, a formal complaint (Exhibit C-1) was filed with the District III B Ethics Committee and was served upon the respondent.

Respondent's answer thereto has been marked as Exhibit C-2.

A Formal hearing was held before this hearing panel consisting of Anne T. Manning, Chair, Julie Kligerman and Eileen Byrne Barrett on the foregoing charges on July 13, July 20 and September 27, 1995, which respondent attended appearing pro se. the matter was presented by John F. Kearney, III, Esquire. All exhibits are herewith submitted.

SYNOPSIS OF ALLEGATIONS

The formal complaint filed charged the respondent with the following allegations of ethical misconduct: R.P.C. 1.2(a):

Respondent failed to abide by his client's decision concerning the objectives of the representation, and failed to abide by his client's decisions as to whether or not to accept an offer of settlement of his claims.

In August of 1986, Jon E. Deluca retained the respondent, in connection with an action against Olivia Newton-John, Patricia Farrar and Koala Blue, Inc., relative to claims for damages arising out of certain business dealings between Mr. Deluca and the company of which he was Chairman of the

Board, Koala Blue (USA) Ltd. and those parties. Suit was filed in Federal Court by the respondent,

however, Summary Judgment was subsequently granted in favor of the defendants and thereafter the Court entered Judgment in favor of the defendants and against Mr. Deluca in the amount of $110,842.00 for costs and counsel fees.

Subsequent to this, Mr. Deluca expressed to the respondent,

on more than one occasion, a desire to terminate and settle the litigation.

Thereafter, the respondent and Mr. Deluca reached a further understanding whereby Mr. Deluca would file for bankruptcy under Chapter Eleven, all costs, expenses and fees paid by the respondent and respondent could pursue the claim, then pending in the Ninth Circuit Court of Appeals: The original retainer agreement was modified by letter agreement dated May 18, 1989. This gave the respondent authority over settlement negotiations, in that it stated no settlement negotiations of less than $100,000,000 would take place without his "concurrence."

Thereafter, during the fall of 1989, notwithstanding that agreement, Mr. Deluca repeatedly requested the respondent to terminate the litigation, settle the litigation and accept settlement offers that were made by the defendant. Respondent failed to do so.

Ultimately, Mr. Deluca filed a pro se substitution of attorney and the appeals were dismissed, and the matters between he and the defendants were settled.

R.P.C. 1.8(j)

Respondent acquired a proprietary interest in the involved cause of action and subject mater of the litigation which he was conducting on behalf of Mr. Deluca.

The above factual setting is repeated with the inclusion of the following information.

The May 18, 1989 amended retainer agreement, signed by both the respondent and Mr. Deluca specifically provided, "It is understood that no settlement negotiations will take place without my concurrence." This effectively franchised the respondent with a veto power over settlement offers.

FINDINGS OF FACT AND CONCLUSIONS

As a result of reviewing the testimony and exhibits the hearing panel
makes the following factual findings and conclusions:

The testimony of Jon Deluca and the respondent, Steven Kramer confirms that Mr. Deluca was indeed a difficult client. He often changed his mind and was ambivalent on the issue of how to proceed in the case. This continued from the time of the entry of the Summary Judgment against him until May 11, 1989.

The record clearly shows that Mr. Deluca repeatedly expressed his desire to settle the litigation in the Ninth Circuit with Olivia Newton-John et al., specifically in letters dated May 11, 1989; May 15 1989 and July 27, 1989.

Mr. Deluca additionally expressed his dissatisfaction with the representation provided by the respondent in the above referenced letters.

In his letter dated July 27, 1989, he expressly instructed the respondent to contact the appropriate party in order to discuss the settlement of the Koala Blue, Inc./Newton-John litigation. There is no

evidence whatsoever that Mr. Kramer ever acted upon these directives of Mr. Deluca.

Finally by letter dated September 20, 1989, Mr. Deluca notified Mr. Kramer that he was immediately releasing him as his counsel in all matters relating to Mr. Deluca.

Jeffrey Jenkins, Esquire, Mr. Deluca's attorney in the bankruptcy matter reiterated this discharge in his letter to Mr. Kramer

dated November 8, 1989. Notwithstanding his termination by Mr. Deluca, the respondent wrote on November 7, 1989 to the Ninth Circuit Court advising the Court that the appeal in the Newton-John case should proceed as to Koala Blue (USA). Further, on November 14, 1989, the respondent wrote to Thomas Orr, the attorney for the trustee advising against settlement in the Newton-John matter and against abandonment of the appeal in the case.

These actions taken by the respondent were undertaken at the time when he had no client interested in these positions.

The respondent argued his actions were justified on the premise that once the bankruptcy petition was filed he, Mr. Deluca no longer was his client but his estate became his client. Mr. Kramer titled himself as Special Counsel and relied upon this status in argument for permitting his activity.

The innate problem here is that he was never appointed or confirmed as Special Counsel by the appropriate body. He cited case law in his opening supporting his claim that once the case suit pending against Koala Blue, Inc./Newton-John became an asset of the estate, he as Special Counsel had a duty to the estate and not Mr. Deluca. This occurred once the bankruptcy petition was filed.

This result occurs but only where the attorney is appointed as Special Counsel by the Court. Mr. Kramer

self-proclamation as same is a smoke screen produced to camouflage his actions.

Indeed in reviewing the testimony of Mr. Deluca and Mr. Jenkins, the bankruptcy attorney it was clear to the panel members

that the bankruptcy petition was filed in order to hold off the $110,000.00 Judgment collection against Mr. Deluca. This was a dilatory tactic as the pressure to collect same was exercised on Mr. Deluca. He became exceedingly upset physically and prone to settle. The filing would reduce pressure on Mr. Deluca and for Mr. Kramer provided time to pursue the Ninth Circuit Appeal.

It is the panel's opinion that this was the reasoning for filing the bankruptcy petition, to delay the collection. In so accomplishing this it was hoped that Mr. Deluca would not seek settlement of the suit. When argument in the Ninth Circuit did not occur as previously discussed and anticipated the bankruptcy matter moved closer to completion, the pressure again fell upon Mr. Deluca. He responded by notifying Mr. Kramer of his desire to settle and several months later of the ultimate decision to terminate his services.

The testimony of Mr. Deluca and Jeffrey J. Jenkins, the attorney in the bankruptcy matter was found to be more credible than that of Mr. Kramer on the issues of the reasons for strategy in filing the petition and the desired results from filing same.

It is the panel's unanimous opinion that the above actions of Mr. Kramer present a clear violation of RPC 1.2(a).

On the issue of the amended retainer agreement dated May 18, 1989 violation of RPC 1.8(j) the panel is once again unanimous in holding the respondent in violation.

The explicit wording "that no settlement negotiations will

take place without my concurrence", on its face gave the respondent veto power over any settlement.

It should be noted that Mr. Kramer in his opening statement cited numerous federal and state cased to the panel. Indeed some were repeated at closing. The panel requested submission by Mr. Kramer of the cases cited, to date none were received, directed to this or allegation numbered one.

Panel Member, Julie Kligerman's research determined no New Jersey case on point. However, Arizona has an identical provision in its Ethical Rules and its Court of Appeals has examined the application of the section.

In Skarecky v. Hornstein, P.A.V. 3605 North 36th Street Co., 825 P.2d 949 (Ariz. App., 1991), the Court held that a law firm's acceptance of the client's assignment of a beneficial interest in a trust deed, intended to secure payment of attorney's fees in a lawsuit concerning that deed, does not violate the Ethical Rules. The Court reasoned that the assignment acted only as a security device for payment of legal fees. The Court noted that, while the firm acquired an interest in the result of the action, it did not acquire an ownership interest in the lawsuit. Of interest here, the court was persuaded that there was no proprietary interest because the plaintiffs, "could still settle or release their claims without the consent of the firm or even against its advice". Skarecky, 825 P.2d at 950. The plaintiffs could also

render the assignment ineffective by deciding to pay the firm's bill rather than rely on the proceeds from litigation.

The Arizona Supreme Court stated that the purpose behind such a Rule is to prohibit an attorney from acquiring an interest in the outcome of a suit in addition to fees and from placing the attorney's own recovery ahead of the client's.

The amended retainer agreement dated May 18, 1989 created this situation. Because he needed to approve any settlement negotiations, Mr. Kramer had a direct interest in proceeding with the appeal. Mr. Deluca was unable to render the agreement ineffective by paying the fees out of pocket. Even had Mr. Deluca paid Mr. Kramer, Mr. Kramer would still have the ability to refuse to settle the case. Clearly, this is an interest in the cause of action, not merely an interest in the result. RPC 1.8(j), only allows such agreements or assignments when their effect is to secure the attorney's fees and costs. Mr. Kramer already secured his attorney's fees by taking the case on a contingency basis. By acquiring a veto power over any settlement agreement, nay any settlement conference, Mr. Kramer established a direct proprietary interest in the action above and beyond his contingency fee.

In fact his actions in amending the original retainer agreement were aimed to secure this interest and assuade Mr. Deluca's financial concern and interest in settlement. In the Panel's opinion his actions were in violation of RPC 1.8(j).

DETERMINATION

The panel has carefully considered and reviewed the testimony and evidence and has concluded that respondent's conduct constituted ethical misconduct in that RPC 1.2(a) and RPC 1.8(j) have been violated as a result of the factual finding above.

As a result the panel recommends a period of suspension.

District III B Ethics Committee

By_____Anne T. Manning____

Hearing Panel Chair

DATE:_____November 1, 1995

STEVEN M. KRAMER & ASSOCIATES
Attorney at Law
THE WARWICK
17TH & LOCUST STREETS
PHILADELPHIA, PENNSYVANIA 19103

TELEPHONE () 846-3000

August 12, 1986

Mr. Jon DeLuca
47 W. Shore Drive
Pennington, N.J.
08534

Re: DeLuca v. Pastucha
DeLuca v. Newton-John, et al.

Dear Jon:

This shall confirm our terms of our agreement:

1.40% contingent fee, whether by settlement or judgment, of all sums recovered.

$8,500, retainer, payable as follows:

i. $5,000 upon signing of this agreement
$3,500 on November 1, 1986.

The retainer shall be applied towards the 40% contingent fee.

Costs are to billed monthly and paid within ten days of the statement.
The initial costs (filing fee, service of process, etc.), totaling $350.00 is to be paid upon signing of this agreement.

You will also at this time pay the $1,000 due in the Sankyo matter.

Please sign the original of this agreement and one copy, return one copy with a check for $5,000 and retain the original agreement for a your files.

I look forward to achieving a successful result.

Best regards,

Sincerely,

Steven M. Kramer

SMK/bn
AGREED TO_____
JON DELUCA

STEVEN M. KRAMER & ASSOCIATES
Attorney at Law
SOUTH PARK TOWER
124 w. 60TH ST.
SUITE 19M
NEW YORK, NEW YORK 10223

TELEPHONE (212) 586-0707
Telecopier (212) 586-0104

May 18, 1989

VIA DHL

Jon DeLuca
189 Sayre Drive
Princeton, NJ 08540

RE: DELUCA V. JOHN, KBI LITIGATION

Dear Jon:

I enclose a copy of my check to Mr. Jenkins to pay for your Chapter XI filing.

This was made pursuant to our agreement which I set forth below:

Our original retainer agreement shall be modified in the following manner. I will be responsible for expenses to pursue this litigation. Those amounts will be deducted from any recovery, as will be your payments for expenses to this date. Also, to be deducted from the gross recovery will be the retainer aid to my firm. After those three deductions (your expenses for the suit, my outlay of expenses, and expenses the retainer), the split shall be 40% to Steven M. Kramer and 60% to Jon DeLuca.

Please sign where indicated and return original to my attention.

It is understood that no settlement negotiations will take place without my concurrence.

Thank you,

Steven M. Kramer
AGREED TO: Jon E. DeLuca

July 27, 1989

VIA TELECOPY

Stephen M. Kramer, Esquire
South Park Tower
124 West 60th Street
Suite 19M
New York, NY 10023

Dear Steven:

As you know, there is a hearing on Monday, July 31 1989, on MacNaughton's Motion to Dismiss my Chapter 11 case. According to Jeff Jenkins, MacNaughton has a good chance of winning. If MacNaughton wins, Jenkins indicated that he will start seizing my assets to satisfy the judgment. I cannot allow that to happen.

I agreed to file for bankruptcy for two reasons. First, you assured me that the Ninth Circuit would promptly decide our appeal and that we had a very good chance of winning. Secondly, I told you that I no longer had any money to continue my suit and wanted to settle, however, you agreed to advance payment of all costs and expenses that would be incurred in continuing my case, including paying Jenkins's attorney's fees and costs for handling the bankruptcy case.

I met with Jenkins on Wednesday, July 26, to discuss the hearing that is scheduled for Monday. Jenkins indicated to me that he will not handle the hearing on Monday since his understanding of his representation was limited solely to filing the Chapter 11 Petition. Jenkins stated that he knew very little about the case and that you should handle the hearing on my behalf. Without expressly stating it, however, Jenkins does not want to handle the case because he is not getting paid and I told him that I have no money to pay him to handle the case.

As I see it, you have two options. First, you can handle the hearing on Monday or agree to pay Jenkins to handle the hearing on my behalf. I need to know immediately which option you intend to

choose since, at the present time, I find myself with two attorneys, none of whom have any interest in representing me.

It seems to me that it is in my best interest that we attempt to settle my case against Olivia Newton-John. I wanted to settle this case back in May but you persuaded me not to do so based on your promise that the appeal would be decided and that you would pay all expenses. Obviously, you have not lived up to your agreement and I again find myself in a situation where MacNaughton is going to seize my assets to satisfy the judgment and neither Jenkins or you are doing anything to prevent that.

Thus, I am instructing you to contact MacNaughton to discuss the settlement of this case. Obviously, in addition to receiving a monetary payment, it is essential that the judgment against me be marked satisfied and that the checking accounts of Barbara frozen by MacNaughton must be released. It seems to me that we have a less bargaining position now than we did back in May, however, I see no other alternative at this time. In talking with Jenkins, he indicated that the Ninth Circuit may not rule until the end of the year. Obviously, if the bankruptcy case is dismissed, all of my assets will have been seized and sold by MacNaughton long before that time. Jenkins also told me that you have never responded to his letter of July 18, 1989 of which he has given me a copy. Based upon Jenkins's letter and your failure to respond, it appears that nobody wants to represent me and will end up at the hearing on Monday without counsel.

If I don't hear from you by 5:00 today, I will instruct Jenkins to contact MacNaughton in an attempt to settle the case. Obviously, I would prefer that you do it but I have lost all confidence that you have any interest in protecting my rights.

Sincerely,

Jon E. DeLuca

P.S. Once again you have left me in a difficult position and in addition to losing the case, I may lose the settlement offered in May of this year.

JENKINS & JENKINS
ATTORNEYS AT LAW
208 WHITE HORSE PIKE
HADDON HEIGHTS, N.J. 08035

(609) 546-9696

July 28, 1989

Steven Kramer, Esq.
124 West 60th St.
Suite 19M
New York, NY 10023

Re: Jon DeLuca
Co-counsel and Representation Agreement

Dear Steve:

The purpose of this letter is to set forth our co-counsel agreement regarding the handling of the above-captioned bankruptcy case. While this case was initially filed as a Chapter 11, you and I and Mr. DeLuca, our client, agree that it would be in his best interest to convert the case to a Chapter 7 and proceed with that form of bankruptcy. I understand that you have represented Mr. DeLuca for years in various Federal Court litigation concerning several of his primary creditors and, therefore, are extremely familiar with Mr. DeLuca's assets, liabilities and former business dealings.

Because Mr. DeLuca lives in New Jersey (where our primary office is located, your main office being in New York) and because I am primarily a bankruptcy attorney and, therefore, have a greater familiarity with the Bankruptcy Laws than you do, I understand that you would like me to handle the day to day matters involved in Mr. DeLuca's bankruptcy proceeding with your advice and counsel (based on your familiarity with Mr. DeLuca's past and present situation and knowledge of the various litigations involving Mr. DeLuca and his creditors).

I also understand that Mr. DeLuca is basically insolvent at this point and is, therefore, not able to advance the legal fees necessary for his bankruptcy representation. I also understand that Mr. DeLuca has potential claims against certain of his creditors, which claims you have pursued in various Federal Courts and which claims may ultimately result in a recovery that would benefit both you and Mr. DeLuca. Therefore, you are interested in seeing Mr. DeLuca protected under the Bankruptcy Laws to give these potential claims time to come to fruition (you would stand to benefit from such fruition as your arrangement with Mr. DeLuca is a contingent one regarding these claims).

I hereby agree to take care of the day to day conduct of Mr. DeLuca's Chapter 7 proceeding (to include converting his Chapter 11 case to a Chapter 7 and appearing at the Motions which are scheduled to be heard in Bankruptcy Court on July 31, 1989) provided you provide me with retainer fees to fund the aforementioned representation as follows: (1) Initial retainer of $3,000.00 payable in three (3) parts ($1,000.00 to be received not later than July 29, 1989, $1,000.00 to be received not later than August 10, 1989 and a final $1,000.00 to be received not later than August 21, 1989); (2) Additional retainers in the amount of $1,000.00 each to be paid by you to me within 10 days of my request for same as previous retainer amounts are used for costs and legal fees.

The hourly rates to be charged by this firm for this representation are $125.00 per hour for partners, $100.00 per hour for associates and $50.00 per hour for paralegals. In addition, the aforementioned retainers shall also be used for various costs incurred by Jenkins and Jenkins in this representation (such as postage, copying costs, telephone costs, etc.).

If any of the retainers due Jenkins and Jenkins are not paid as indicated above, you agree that you will be entirely responsible for the legal representation of Mr. DeLuca in his Chapter 7 Bankruptcy proceeding. Could you please sign this agreement and return it to me with the initial retainer amount on

July 29, 1989 (could you please federal express the retainer and the signed agreement to the following address: Lorraine M. McTieran, Esquire, 20 High Street, Apt. 7, Woodbury, New Jersey 08096. I have asked you and Jon DeLuca to sign this agreement (I will send a copy to him for his signature after I receive the original back from you) to indicate your agreement with same.

Very truly yours,

Jeffrey E. Jenkins

JEJ/emm

I agree to the representation terms and conditions contained in this letter agreement.

_____

Steven M. Kramer, Esq.

_____

Jon DeLuca

STEVEN M. KRAMER & ASSOCIATES
Attorney at Law
SOUTH PARK TOWER
124 w. 60TH ST.
SUITE 19M
NEW YORK, NEW YORK 10223

TELEPHONE (212) 586-0707
Telecopier (212) 586-0104

BY FAX

To: Jeffrey Jenkins
Re: Jon DeLuca
Dated: 11/8/89

Regarding your letter of today's date, please be advised of the following:

I have a fiduciary duty to Koala Blue USA Ltd., independent of my representation of Mr. DeLuca. Mr. DeLuca is but one shareholder of that corporation. Hence, I fully intend to represent that corporation's right through the appeal.

b. The Ninth Circuit has scheduled oral arguments on the appeal for December 5. As I anticipate that the summary judgment will possibly be reversed, it is my position that your stipulation to attempt to stay that action is ill-advised. Is the trustee aware of the tendency of the oral argument and the likelihood of success? Is the Bankruptcy Judge?

c. I have yet to receive a statement from you concerning the $1,400. I personally paid your firm on behalf of Mr. DeLuca, despite my repeated requests for same.

king comments about "unethical" conduct
until you have all of the facts. It is reckless.

I must go on record as well as having never been consulted about the
purported stipulation, which I believe is against Mr. DeLuca's estate's interest.

Steven M. Kramer

Smk/mp

cc: Thomas Orr
Jon DeLuca
W. Jes. MacNaughton, Esq.

NOV 13 '89 17:29 STEVEN M. KRAMER & ASSOCS.

STEVEN M.KRAMER, LAW OFFICES

November 12, 1989

TO: EDW, PASTUCHA
RE: DE LUCA ET AL V. N.JOHN

In response to your fax of 11/8, please advise substitute counsel for KB(USA)Ltd. for the California actions. As you know, I am required to continue as counsel until substitution is accomplished, pursuant to the Ninth Circuit rules. In that regard, I intend to appear at the Dec. 5 oral argument and participate therein.

Steven M. Kramer

smk/mp

STEVEN M. KRAMER & ASSOCIATES
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NEW YORK, NEW YORK 10223

TELEPHONE (212) 586-0707
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BY FAX

11/14/89

TO: TOM ORR, ESQ.
Re: DE LUCA

Dear Mr. Orr:

I have advised as of yesterday in various pleadings that you were served upon me that the parties have tentatively agreed to a settlement and that this settlement consists of abandonment by Mr. DeLuca of his California actions without the payment of any money to him or the estate.

It is my opinion based upon litigating those cases for 3 ½ years that they are highly valuable, that the defendants in those cases know it and that is why they are apparently so eager to have Mr. DeLuca settle on such terms.

The value of those cases may well grow considerably if Mr. DeLuca prevails at oral argument on the first of these appeals, which is scheduled to be heard in Pasadena on Dec. 5 before the Ninth Circuit Court of Appeals.

I am at a complete loss as to how Mr. Jenkins can advise that this settlement is in the best interest of the estate. As I was to be co-counsel in this bankruptcy proceeding, according to my agreement with Mr. DeLuca and Mr. Jenkins, I must go on record as strenuously objecting to such settlement as completely against the interests of the estate.

Would you be so kind as to forward whatever papers you may have concerning this proposed settlement and also advise me of the date, time and location for the hearing before the bankruptcy court on the settlement so that I may be heard.

Thank you,

Steven M. Kramer

Smk/mp
cc: Jeffrey Jenkins, Esq.
Jon DeLuca

STEVEN M. KRAMER & ASSOCIATES
Attorney at Law
SOUTH PARK TOWER
124 w. 60TH ST.
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NEW YORK, NEW YORK 10223

TELEPHONE (212) 586-0707
Telecopier (212) 586-0104

October 29, 1990

TO: ALAN BRUCE, ESQ.

Re: DE LUCA, JON

Mr. Bruce:

I enclose the May 18, 1989 agreement that was entered into upon the filing of Mr. DeLuca's bankruptcy petition.

I responded to the charges as follows. Upon filing the bankruptcy petition, Mr. DeLuca and I agreed that I should, with court approval, continue to prosecute the California actions. Given the fact that I was intimately familiar with the litigation and had probably over 500 hours in the case, it would appear to make sense to take that approach.

It was my understanding and is today, based upon my prior experience as special counsel to debtors in bankruptcy that my fiduciary duty is no longer at the time of the filing of the petition for bankruptcy, solely to the debtor, but to the estate. It was for that reason that the agreement was modified all of which was done with the full knowledge of

Mr. Jenkins, Mr. DeLuca's bankruptcy counsel. In my prior experience, such fee arrangements are to be approved by the bankruptcy court. It was my understanding that this would certainly be done in this case.

Before that could be done, however, Mr. DeLuca settled with the defendants and dismissed the bankruptcy proceeding.

Thank you for your attention to this matter.

Sincerely,

Steven M. Kramer

smk/hj

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

FILED

AUG 31 1990

AT 8:30_____
STEVEN KRAMER,
WILLIAM T. WALSH, CLERK

CIVIL ACTION NO: 90-0232 (JCL)

PLAINTIFF,

v.

MEMORANDUM AND ORDER

JON DELUCA,

DEFENDANT.

ON THE DOCKET ON 8-31-1990

WILLIAM T. WALSH, CLERK
By TB
(Deputy Clerk)

LIFLAND, District Judge

Plaintiff Steven Kramer brings this action for breach of contract pursuant to 28 U.S.C. §1332. Presently before the court is defendant Jon Deluca's motion for summary

judgment and sanctions. After consideration of the moving papers, the court grants both of defendant's motions.

BACKGROUND

Plaintiff is an attorney licensed to practice law in the State of New Jersey. In 1986 defendant entered into a written retainer agreement whereby he agreed to retain plaintiff to prosecute a number of actions arising out of prior business dealings defendant had with various partners, franchisers and an entity known as Koala Blue (USA). The agreement provided for a 40% contingent fee against an $8,500 retainer. The retainer was paid by the defendant to the plaintiff. The agreement also provided that the defendant could not enter into settlement negotiations without the consent of the plaintiff.

On defendant's behalf, plaintiff filed suit in the United States District Court, Central District of California, against Koala Blue. That court subsequently granted summary judgment in favor of Koala Blue, and awarded attorney's fees and cost in favor of Koala Blue, and against defendant, in the amount of $110,000. The defendant subsequently dismissed the plaintiff as his attorney, and entered into settlement negotiations with Koala Blue. Those negotiations resulted in a payment to defendant from Koala Blue of $10,000 and the discharge of the $110,000 judgment.

Plaintiff than instituted this action to recover attorney's fees and costs related to the Koala Blue lawsuit. Plaintiff did not notify defendant of his right to utilize the arbitration process, as required by New Jersey Court Rule 1:20A-6.

The first count of the complaint alleges that pursuant to a modification of the retainer agreement, defendant agreed to prosecute certain litigation through two pending appeals in the Ninth Circuit. Plaintiff contends defendant breached the contract by terminating plaintiff without cause, refusing to communicate with plaintiff and dismissing the appeals. See Complaint ¶ 9. The second count alleges quantum meruit. Plaintiff seeks compensation for services rendered on behalf of defendant as well as costs incurred during the representation of defendant.

LEGAL STANDARDS

Fed. R. Civ. Pro. 56(c) provides that summary judgment may be granted when the materials of record establish that "there is no genuine issue as to any material facts and that the moving party is entitled to judgment as a matter of law." Hersh v. Allen Products Co. Inc., 789 F.2d 230, 232 (3d Cir. 1986). When a properly supported motion for summary judgment is made, the opposing party must establish precise facts demonstrating that there is a genuine issue for trial. The court will determine that there is "no issue for trial unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1985). This court holds that defendant is entitled to judgment as a matter of law, with regard to plaintiff's breach of contract and quantum meruit claims.

DISCUSSION

1. **Breach of Contract Claim**

The first count of the complaint alleges that defendant breached the contract by terminating plaintiff without cause, refusing to communicate with plaintiff and dismissing the appeals. By making this claim, plaintiff asserts that it is the attorney, and not the client, who controls the objectives of the representation. This contention is contrary to public policy, as well as to the very Rules of Professional Conduct by which

defendant is bound. Rule 1.2(a) of the Rules of Professional Conduct sets forth that:

A lawyer shall abide by a client's decisions concerning the objective of representation... and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter.

The provision of the retainer agreement which attempts to limit defendant's right to settle the lawsuit is contrary to Rule 1.2(a). The defendant in this case had the right to settle the litigation at any time, the necessary consequence of which was to discontinue plaintiff's representation. Thus, because plaintiff cannot charge defendant with breach of a portion of a contract that was void, the breach of contract claim fails.

2. **Quantum Meruit Claim**

Plaintiff also contends that he should be compensated for his services on the basis of quantum meruit. In support of this position plaintiff relies on the cases of Complaint of Cap'n Rick Corp., 525 F.Supp. 31 (S.D.N.Y. 1981 affirmed 685 F.2d 423 (2d Cir. 1982) and Cook v. Movan Atlantic Towing Corp., 79 F.D.R. 392 (S.D.N.Y. 1978). Both Cap'n Rick and Cook involved attorneys suing for contingent fees after they had

been dismissed by their clients. In those cases, the clients discharged their attorneys and went on the settle their claims. Their attorneys then sued to enforce the contingent fee agreements. Both courts determined that the attorney could not recover for their contingent fees,

but were limited to recovering the value of their services. Cap'n Rick and Cook both involved instances where the attorneys could be said to have secured a benefit for their clients.

In the present case, while plaintiff was representing defendant, the District Court in California granted summary judgment against defendant and in favor of Koala Blue and awarded $110,000 in attorney's fees and costs against Mr. Deluca. Not surprisingly, defendant then went on to discharge plaintiff and settle the case himself. Plaintiff's services resulted in no net benefit to defendant. Thus, quantum meruit is not a remedy that is available to the plaintiff in this instance.

Moreover, the quantum meruit claim, insofar as it is based on litigation costs advanced by plaintiff, is defeated by the retainer agreement that plaintiff and defendant signed. It covered the issue of who was responsible for the expenses of litigation and provided that the plaintiff "will be responsible for expenses to pursue this litigation. Those amounts will be deducted from any recovery, as will be your payment for expenses to this date." Additionally, the entire quantum meruit claim suffers from the fact that plaintiff has received all that the agreement may have required; even if plaintiff could argue (which he cannot) that he secured a $10,000 benefit for defendant, the $8,500 retainer far exceeds the contingent fee ($4,000) set forth in the agreement.

3. **Violation of Rule 1.8(j) of the Rules of Professional Conduct**

This court has noted a violation of Rule 1.2(a). There is also a possible violation of Rule 1.8(j). The modification of the retainer agreement dated May 18, 1989 states: "It is understood that no settlement negotiations will take place without my concurrence." RPC 1.8(j) provides:

> A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may: (1) acquire a lien granted by law to secure the lawyer's fee or expenses, (2) contract with a client for a reasonable contingent fee in a civil case.

The modification suggests that plaintiff sought to acquire an interest in the litigation, in violation of RPC 1.8(j), by securing a right to veto settlement. As was discussed earlier in this order, the plaintiff, by way of his agreement with defendant, did violate Rule 1.2(a).

It is unnecessary to reach the merits of plaintiff's compliance with these rules. However, it appearing that serious ethical violations may have been committed, the matter will be referred to the appropriate authorities for investigation.

4. **Sanctions**

Defendant also asks this court to impose sanctions against plaintiff for attorney's fees incurred as a result of plaintiff's conduct regarding three scheduling conferences. This court grants defendant's motion as to the first scheduling

conference, at which plaintiff failed to appear. Plaintiff does not provide an affidavit or a certification as to the reason for his failure to appear, but in his brief plaintiff offers by way of explanation that he missed the conference due to an "inadvertent" error. Inadvertent error will not justify an attorney's absence from a scheduling conference which inconveniences another attorney as well as a United States Magistrate.

Payment of defendant's attorney's fees attributable to that conference is an appropriate sanction. Defendant's attorney submitted a certification setting forth the fees incurred due to plaintiff's not appearing at this scheduling conference. He states that 2.75 hours, at $100.00 per hour, was expanded due to plaintiff's failure to appear at the conference. This court finds that this is a reasonable appraisal of the cost to defendant's attorney. Thus, plaintiff is sanctioned $275.00 for his unjustified absence from the first scheduling conference.

At the second conference, plaintiff sent an associate who was totally

unfamiliar with the case. The conference was therefore unproductive. Plaintiff was also one hour late for the third scheduling conference. While regrettable, this conduct will not generate sanctions.

Accordingly, IT IS on this 31st day of August, 1990 ORDERED that defendant's motion for summary judgment against plaintiff is granted; and

IT IS FURTHER ORDERED that defendant's motion for sanctions against plaintiff is granted, in the amount of $275.00

JOHN C. LIFLAND
United States District Judge

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DISCIPLINE WATCH

By HENRY GOTTLIEB

FAVORABLE OUTCOME MEANS HAVING TO SAY YOU'RE SORRY

Smart lawyers always cooperate when they are targeted by a district ethics committee. And when the disciplinarians have the goods, the smart lawyer is quick to say "Sorry".

The value of cooperation and contrition were made clear Feb. 26 in a Disciplinary Review Board decision that saved a lawyer from a three-month suspension for misrepresentation, failure to keep clients informed failure to put a retainer agreement in writing, and gross neglect of two cases.

In a 4-3 decision, the DRB said the misbehavior of **James Picciano**, a solo practitioner in Haddonfield, cost two clients thousands of dollars. And although multiple offenses like Picciano's have resulted in suspensions, Picciano got a reprimand.

Multiple offense case that have led to suspension "have generally involved an addition with the disciplinary authorities, as well as consideration of aggravating factors, such as prior disciplinary history," the majority wrote.

"It is true that the consequences of respondent's misconduct were serious," the majority said. "However, respondent readily admitted his wrongdoing and expressed contrition for his misconduct and its attendant consequences."

The three-member minority would have given Picciano a three-month suspension because of the "severity of consequences" of the misconduct, the opinion said.

It was the closest decision in the DRB since October, when the board began making its voting tallies public under the state Supreme Court's new open disciplinary system.

It also is the first public vote to exhibit

evidence that any members of DRB...decision, Elizabeth Buff, a hospital executive, and William Thompson,

the supervising dentist for the state Corrections Department, voted for the stiffer penalty. They were joined by Michael Cole, a partner in Morristown's Riker, Danzig, Scherer, Hyland & Perretti.

A 0062 (CONT'D)

Every other lawyer who participated voted for a reprimand. The other members are: DRB Chairman Lee Hymerling, a partner in Haddonfield's Archer & Greiner; Paul Huot, a retired Superior Court judge; James Zazzali, of Newark's Zazzali, Zazzali, Fagella & Nowak; and Mary Maudsley, of April, Maudsley & Goloff in...

Except in cases of disbarment, DRB opinions are not automatically reviewed by the state Supreme Court, so the Picciano decision will stand unless the Supreme Court reviews the case on its own initiative or on application by a party. As of Friday, no application for review has been made.

According to the DRB's opinion, Picciano botched two complex commercial cases – one over the ownership of three horses and one over a $200,000 contract.

In the horse case, Picciano was hired in 1992 with a $2,500 retainer to defend a stallion owner accused of improperly selling three mares left for breeding at his farms. During

the next few months, the DRB found, Picciano failed to forward answers to the plaintiffs' counsel, failed to file a counterclaim, failed to attend a mediation, and failed to inform his client about ...

Eventually, with a new lawyer, the client... with his case and won a partial victory, but it cost the client an additional $10,000 in fees to reinstate the case that had been dismissed while Picciano was, or rather, wasn't on the job.

A0062(A)

In the other case – a dispute in 1989 over whether a contract was valid or fraudulent – Picciano's failure to file an answer led to a $243,283 judgment against his client, and it took two other attorneys and a bankruptcy proceeding to sort out the problems left by Picciano's misconduct, according to testimony considered by the DRB.

A 0062 (B)

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

----------X

IN RE STEVEN KRAMER : Misc. 97-258

:

:

:

----------X

RESPONSE TO STEVEN KRAMER TO ORDER TO SHOW CAUSE

Respondent never had a chance in the state proceedings at any stage to have an objective body evaluate the charges.

Respondent's rights were decimated by a proceeding that was permeated by bias at every stage.

Purely by chance, at a hearing before Judge Irenas on January 3, 1997, respondent discovered that Justice Stein participated in a completely improper ex parte communication with his son and his son in law, two bitter adversaries of the respondent. The son, Michael Stein, Esq., admitted under cross examination that he had secretly complained to his father about the respondent. This was done at a time that the subject disciplinary proceeding was pending before the New Jersey Supreme Court. This is astonishing.[1]

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[1] This matter resulted in Michael Stein and Mr. Karasick receiving over $500,000 (five hundred thousand dollars) in fees.

The DRB included as a key member Michael Cole, Esq., a senior litigation partner in the Riker Danzig firm. Riker Danzig is counsel to R.J. Reynolds Tobacco co. and United Jersey Bank, two

adversaries of the respondent. Respondent discovered that Cole was a member of the Riker Danzig firm shortly after the DRB recommendation. Respondent objected to the DRB Secretary and was blithely advised that the secretary was confident that the multiple conflicts would not enter into Cole's decision.

At the district level, the presenter was a part time judge who heard cases in the area where the hearing committee members practiced. The committee refused to hear respondent's objection and indeed did not even deign to rule on it. Instead it simply ignored the respondent and proceeded with the hearing as if respondent had never opened his mouth.

The N. J. Supreme Court refused to allow the respondent to enlarge the record to enter evidence of these repeated acts of bias or appearances of impropriety.

The foregoing clearly would permit a reasonable finder of fact to conclude that the respondent was a victim of bad faith. Middlesex County Ethics Comm., supra at 437.

The basis for the suspension was a provision in a retainer

agreement with a bankruptcy debtor client that required respondent's participation in any settlement negotiations in order for respondent to protect the interests of the bankruptcy estate by preventing any side deal by the

debtor. Respondent had reason not to have complete confidence in the debtor, hence the need for the provision.

A 0063 (A)

The N. J. Disciplinary Review Board and state court imposed a six month suspension on the respondent for conduct-entering into a fee agreement in the context of a bankruptcy that required the debtor to involve the respondent in any settlement negotiations – that is completely proper under the federal bankruptcy rules. Bankruptcy counsel has a duty to prevent the debtor from entering into side deals, exactly what the debtor did here. "Any counsel retained by the trustee or debtor in possession is a fiduciary. He owes the duty of undivided loyalty and exclusive allegiance to the estate in bankruptcy." In re Prudent Holding Corp., 152 B.R. 925, 939 (Bkrtcy NDGA 1992). That duty imposes a fiduciary duty to the creditors. Commodity Futures Trading Commission v. Wein Traud, 471 U.S. 343, 105 S. Ct. 1986) (1985). The DRB based its finding on the mistaken belief that petitioner's duty was "primarily" to the debtor in possession. Under basic bankruptcy precepts, nothing could be further from the truth. Accord In re Wild Horse

Enterprises, Inc., 136 B.R. 830, 840 (Bankr. C.D. Cal. 1991). Moreover, an attorney's duty to advise the debtor-in-possession goes beyond merely providing the debtor advice and obligates that attorney to exhibit "an active concern for the interest of the estate, and its beneficiaries, the unsecured creditors." In re Wild Horse Enterprises, Inc. 136 B.R. at 840. Accordingly, the N.J. Disciplinary Review Board and state court's ruling clause is in conflict with federal law and violates the Supremacy Clause.

A 0063(B)

The state court's suspension was based in substantial part on the finding that respondent had violated the ethical rule prohibiting an attorney

from taking an interest in a lawsuit by requiring participation of bankruptcy counsel in any settlement negotiation in a bankruptcy matter. That rule is in conflict with the federal rules requiring counsel to exercise a fiduciary duty to the bankruptcy estate and therefore violates the Supremacy Clause. The New Jersey courts have thus made it clear that it will discipline any bankruptcy counsel who attempts to honor her fiduciary duty to the bankruptcy estate's creditors by requiring the debtor not to negotiate a settlement without bankruptcy counsel's participation. see District of Columbia Court of Appeals v. Feldman 160 U.S. 462, 487, 103, S. Ct. 1303, 1316 (1983).

Moreover, the rule itself is not clear and does not specifically prohibit the sanctioned conduct.

n doing so, the N. J. Disciplinary Review Board and the state court deprived respondent of the privileges and immunities guaranteed to him by the 14th Amendment of the U. S. Constitution. They also deprived the respondent of equal protection and due process under the law.

The N. J. Disciplinary Review Board and the state court permitted a key decision maker on the Disciplinary Review Board, Cole, to vote that respondent be suspended for six months even though at the time, Cole was a senior partner in the litigation department of Riker Danzig, counsel to R. J. Tobacco Company in a least six lawsuits brought by the respondent on behalf on N.J. citizens and even though Cole was counsel to United Jersey Bank in a suit brought by a client of the respondent's in a case that recently resulted in a seminal decision by the N. J. Appellate Division

against Cole's client. It was therefore in Cole's personal financial interest and that of his clients to eliminate respondent and to stigmatize him.

The N. J. Disciplinary Review Board and state court permitted the 'presenter' [prosecutor] of the charges to be an attorney who is also a judge in the vicinage in which the local ethics committee's panel members practice. It was therefore in the personal interests of the panel members to curry favor with the judge by ruling in his favor and against the respondent. The N. J. Disciplinary Review Board and state court ignored the respondents' objection.

The N. J. Disciplinary Review Board and state court were motivated in part because of the respondent's N. Y. residence as demonstrated by the following:

The N. J. Disciplinary Review Board and state court imposed a much more severe penalty on the respondent, a N. Y. resident, than it has done for N. J. based lawyers who engaged in equal or more severe transgression.

For example, the N. J. Disciplinary Review Board and state court have routinely imposed only reprimands on N. J. based attorneys for such conduct as negligent misappropriation of funds [In the Matter of Hofing, 655 A2d 914 (1995); gross neglect and lack of diligence [Matter of Williams, 655 A2d 914 (1995); wife-beating [In the Matter of Magid, 655 A2d 916 (1995), etc.

No. N. J. based attorney has ever been sanctioned, let alone suspended, for inserting such a provision in a fee agreement in similar circumstances.

Respondent never had a realistic opportunity to fully and fairly litigate the constitutional claim in the state court proceeding. Valenti v. Mitchell, 962 F2d 288, 296 (3d Cir. 1992). see also Centifanti v. Nix, 865 F2d 1422, 1433 (3d Cir. 1989). The N. J. Disciplinary panel and Court have not disputed that it did not permit such an opportunity. Nor could they since they specifically denied respondent's motion to enlarge the record to include evidence of the due process violations.

Respondent was also suspended in part for refusing to withdraw from representing the client on the grounds that the rules of the U. S. Court of Appeals for the Ninth Circuit prohibited him from withdrawing until new counsel substituted in for him. Respondent had written to debtor that the rules required substitution and the response would promptly sign such substitution respondent even offered to draft the document. The Supremacy Clause requires that state to honor the Ninth Circuit's rules.

The N. J. Disciplinary Review Board and state court refused to hear respondent's constitutional claims and denied respondent's motion to enlarge the record to include the evidence of due process violations.

The Supreme Court has made it clear that the 'opportunity' to practice law should be considered a fundamental right.' Supreme Court of New

Hampshire v. Piper, 470 U.S. 274, 281 (1985). That right has been violated in contravention of basic due process guarantees.

17. As the Supreme Court has cautioned: "We have recognized various other conditions that must also be satisfied before giving preclusive effect to a[nother court's] judgment. See Generally, Montana v. U.S., 440 U.S. 147...(1979). For example, collateral estoppel effect is not appropriate when controlling facts or legal principles have changed significantly since the state-court judgment." Id. At 155..., or when 'special circumstances warrant an exception to the normal rules of

preclusion, Montana v. U.S., supra at 155... see, for example, Porter and Dietsche, Inc. v. FTC 605 F2d 294, 300 (7th Cir. 1979), cf Montana v. U.S. at 163...(Preclusive effect to a state court judgment may be inappropriate when the §1983, claimant has not freely and without reservation submitted his federal claims for decision by the state courts...and had them decided there...''' (quoting England v. Medical Examiners, 375 U.S. 411 (1964)." Haring v. Prosise, 462 U.S. 306 103 S. Ct. 2368, 2378(1983). (emph. added).

18. This Court should not give collateral estoppel effect to the state

ruling for the reasons set forth above.[2]

Respectfully submitted,

Steven M. Kramer
Steven Kramer & Associates
150 W56th Street, 65th Floor
New York, NY 10019

[2]Respondent objects to the participation of Judges Bissel and Bassler in this proceeding.

Dated: July 3, 1997